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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981.

MILWAUKEE TYPOGRAPHICAL UNION NO. 23,

Petitioner,

vs.

NEWSPAPERS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI.

QUESTIONS PRESENTED FOR REVIEW.

1. Does an arbitrator's interim award directing the parties to negotiate over the impact of technological changes on the "job

elements" within the bargaining unit draw its "essence" from the provisions of a collective bargaining agreement?

2. Does an arbitrator lose his authority to resolve the merits of a dispute over the interpretation and application of terms of a collective bargaining agreement as the result of a court's determination that an interim award by the arbitrator was not drawn from the "essence" of the agreement?

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OPINIONS DELIVERED BELOW.

1. The Arbitrator's Opinion and Award.

The subject litigation is founded on part of an interim opinion and award of Carl A. Warns, Jr., as impartial chairman of an arbitration board, issued on March 29, 1979. (A1) A partially concurring and dissenting opinion was filed by the Employer members of the arbitration board. (A28)

2. The Decisions and Orders of the United States District Court For the Eastern District of Wisconsin.

On January 31, 1980, the District Court upheld the Petition of the Milwaukee Typographical Union (the Petitioner herein) to enforce Paragraph 3 of the aforesaid arbitration award. (A42-43) Paragraph 3 of said interim arbitration award provided for the contract dispute to be returned to impartial arbitration if the parties were unable to reach

agreement through good faith negotiations within 60 days of the interim award. (A26-27)

On March 31, 1980, the District Court denied Newspapers, Inc.'s (the Respondent herein) motion to stay the court's order directing the parties to return their contract dispute to impartial arbitration. (A44)

3. The Opinion and Decisions of the United States Court of Appeals For the Seventh Circuit.

On January 23, 1981, a panel of the Court of Appeals reversed the decision of the District Court, holding unenforceable both the interim arbitration award directing negotiations between the parties, and the arbitrator's directive that failing agreement between the parties, the contract dispute was to be returned to impartial arbitration for final decision. (Decision of the Court of Appeals, p. 14, A66)

On March 31, 1981, the Court of Appeals denied a Petition For Rehearing, noting that Chief Judge Fairchild and Judges Swygart and Cudahy would have granted the en banc rehearing request. (A68) The panel of the Seventh Circuit, denying rehearing, consisted of Judges Pell and Wood, and Senior Judge Byron G. Skelton of the United States Court of Claims sitting by designation.

JURISDICTIONAL GROUNDS.

Original jurisdiction in the United States District Court was founded on Section 301, Labor-Management Relations Act, 29 U.S.C. §185 and the United States Arbitration Act, 9 U.S. C. §1-14. This Petition For Writ of Certiorari is brought pursuant to 28 U.S.C.§1254(1) to review the aforesaid decision of the Court of Appeals, entered on January 23, 1981 and the denial of rehearing on March 31, 1981.

RELEVANT STATUTORY PROVISIONS.

29 U.S.C. Section 185(a):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

9 U.S.C. Section 9, in relevant part reads:

> "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. ..."

9 U.S.C. Section 10(d) and (e):

> "In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> ***
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

9 U.S.C. Section 11(c):

> "In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> ***
>
> (c) Where the award is imperfect

in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

STATEMENT OF THE CASE.

The issue in this case is the propriety of the Court of Appeals' review of the scope of an arbitrator's authority to interpret and apply provisions of a collective bargaining agreement, as provided by Section 301 of the Labor-Management Relations Act, supra.

The undisputed facts must be drawn from the opinion and interim award of Arbitrator Warns.

The Contract Dispute Which Led to Arbitration.

The Petitioner labor organization is the exclusive bargaining representative for all of the Respondent Employer's composing room employees engaged in the production of the Respondent's daily newspapers. The subject bargaining agreement was effective from March 4, 1975 for a five year term.

From February through June, 1976, the

parties were unable to resolve a dispute whether the Employer's unilateral introduction of a new, computerized video display system (referred to as the "Hendrix System") was a substitute process for preexisting composing room functions, as specifically set forth in the "Jurisdiction" section of the bargaining agreement. (A4-6) Abiding by the grievance resolution provisions of their agreement, the parties jointly submitted their dispute to impartial arbitration.

The issues between the parties were summarized by Arbitrator Warns in his opinion:

> "The Union provides the framework for analysis as follows: 'The dispute between the parties is not whether the Hendrix system should be introduced, but the question of the right of the Union to negotiate over its impact and/or the scope of the jurisdictional language of the collective bargaining agreement' (from the Union's Brief, pp. 2-3)." (A3-4)

"The Company poses this issue:

'Whether the Company's introduction and use of the electronic text editing system ('VDT System') violates the contract?'" (A-13)

The Petitioner relied upon the "Recognition" and "Jurisdiction" provisions of the bargaining agreement, Sections 3 and 4 respectively. The Recognition clause provides that the Petitioner is "the exclusive bargaining representative" for employees engaged in "...all Composing Room work..." and was specifically referenced by the Petitioner to the Respondent prior to submission of their dispute to arbitration. (A4-5)

The Recognition clause of the agreement is followed by the Jurisdiction section. Section 4 is lengthy and describes in some detail the type of functions and equipment employed in composing room work. The key provisions are found in the final four paragraphs of the section set forth by the

Arbitrator on pages 5-6 of his opinion. (A6 to A10) In summary, these provisions require:

1. That the Union's recognition and the scope of the bargaining unit covers "...any process, machinery or equipment which functions as a substitute for or evolution of, the typesetting and typecasting processes ...." (emphasis added), including "...the preparation of all input and handling of output, operation of the computer and all input and output devices..." "when a computer is used for composing room work...."

2. A joint committee of an equal number of union and employer representatives is to attempt to resolve "all questions concerned with": (a) the method of operation; (b) the complement of men; and (c) the retraining of affected employees. The joint committee is to function after the Union has

been notified by the employer "...in advance of any changes" in the abovementioned processes, machinery or equipment.

3. If the joint committee is unable to resolve the questions, delineated above, then the final resolution of the questions is to be submitted to final arbitration. In this regard, Section 4 incorporates the provisions of Section 7 of the agreement, describing a formal grievance procedure terminating in joint submission to binding arbitration. (See A7-9)

From the outset, the parties held to a fundamental difference of views concerning the relationship of the new Hendrix system to contract rights. The Employer had consistently maintained that the system was not a "substitute process" or incorporated "input devices" for computerized phototypesetting within the meaning of Section 4 of the

bargaining agreement. Contrary, the Union argued that Hendrix was such a new process and the Employer was obligated to first notify the Union and negotiate over the impact of the system upon the employees and operations of the composing room as provided by Sections 3 and 4 of the agreement. Furthermore, the Union contended, failing agreement of the parties, if Hendrix is a "substitute process", then the parties were bound to submit their unresolved differences relating to the "method of operation", "the complement of men",and "the retraining of affected employees" to binding impartial arbitration. (A3-4)

The Arbitrator's Interim Findings and Award.

Following three days of hearing, a transcript of proceedings, and post-hearing briefs, Arbitrator Warns rendered an interim decision remanding the dispute to the parties for 60

days of negotiations. The interim ruling was accepted by the union members and dissented to by the employer members of the arbitration board. Arbitrator Warns held that the Hendrix system is subject to the resolution of questions which impact upon the bargaining unit, as set forth in Section 4 of the agreement. (A23)

Then, having decided that Section 4 of the agreement was applicable, Arbitrator Warns directed the parties to attempt to settle questions arising from the Hendrix system and the work of the bargaining unit for a period of 60 days; and failing agreement, "...the matter shall be returned to a mutually selected Arbitrator, or if none can be agreed upon, to this Arbitrator for a specific ruling." (A27)

In directing the parties to attempt to negotiate their differences before returning

to the arbitration forum, Arbitrator Warns noted that his interim directive was consistent with decisions of the National Labor Relations Board and the federal courts concerning the duty to bargain over job changes affecting composing room operations occurring during a contract term. The Arbitrator then utilized the Board's "good faith" bargaining standard as a guideline for the parties' 60 day period of negotiations. (A23, A27)

Proceedings Before the District Court.

Following the Arbitrator's interim decision, the parties unsuccessfully attempted to negotiate their differences, although the Employer reserved its position that the Arbitrator had exceeded his authority and also any further arbitration proceedings over the merits of the dispute are not arbitrable.

On June 1, 1979, the Union sought to

remand the controversy to arbitration, as provided by Paragraph 3 of Arbitrator Warns' interim award. (A26 - 27) The Employer refused to resubmit the dispute to arbitration. On August 17, 1979, the Union filed a petition for enforcement of the award. The petition stated, in part, that the parties had exhausted at least 60 days of unsuccessful negotiations; and, therefore, the Union requested "...that the court order the Respondent to comply with the subject arbitration award and submit their dispute to Arbitrator Warns for a 'specific ruling.'"

The District Court's opinion and order refers to the Respondent Employer's position throughout the post-arbitration proceedings. The Employer has contended that Arbitrator Warns was without contract authority to fashion an interim award directing negotiations between the parties. Following this

stated premise, the Employer then concludes that, as a matter of law, further arbitration proceedings, following the unsuccessful negotiations, resolving the merits of the dispute which was originally submitted to arbitration are foreclosed. The District Court alluded to, but, rejected the Employer's position, both as to the authority of the Arbitrator to fashion an interim award and the continuing jurisdiction of the arbitration forum over the merits of the dispute:

> "The respondent concedes that the contract requires negotiation or arbitration over the method of operation, the complement of men required, or the retraining of affected employees arising from new Composing Room technology. What constitutes 'new composing rom technology' is a matter of contract interpretation for the arbitrator and not for this court to decide. Once having decided that technological change in the Editorial Department was included within the spirit of that phrase, Arbitrator Warns was entitled to impose the remedy provided for in

the contract when such change occurred." (A39-40)

The District Court's conclusion was reiterated in a subsequent decision denying the Employer's request for a stay. (A52)

The Decision of the Court of Appeals.

A panel of the Seventh Circuit accepted the Employer's reasoning. The Court first recognized that the bargaining agreement specifically required the Employer to notify and negotiate with the Union over the "... method of operation, the complement of men required or the retraining of affected employees" upon the introduction of new composing room processes. (Decision of Court of Appeals, A64) The Court of Appeals stated that an impartial arbitrator had the authority to interpret and apply the relevant provisions of Section 4 of the agreement and, if the parties were unable to negotiate their differences

"...that the dispute shall be submitted to arbitration. (F.n. 7, Decision of Court of Appeals, A64, referring also to F.n. 3, Decision of Court of Appeals, A56)

However, the Court of Appeals disagreed with the District Court that the interim award directing the parties to first attempt to negotiate their differences over the "impact" of the new processes on composing room operations was consistent with the detailed scope of negotiations set forth in the "new process" clause of the contract. The key part of the Court of Appeals' decision states:

> "Negotiating over the impact of the VDT system on composing room employees would include bargaining over a broad range of items including, but not limited to, issues such as involuntary layoff, termination, bonuses and loss of overtime. A directive to bargain over this broad range of issues injects items into negotiation which were not contemplated by the 'new process' clause of the collective bargaining

contract. Even the most general of the three categories, method of operation, clearly refers to how the system will be run and is not a catchall term which imposes a duty to bargain about anything conceivably affected by the new technology. Consequently, because Part 2 of the arbitration award does not draw its essence from the contract, it cannot be enforced. See, e.g., City Electric, Inc. v. Local Union 77, Int'l Brotherhood of Electrical Workers, 517 F.2d 616, 619-20 (9th Cir.., cert. denied, 423 U.S. 894 (1975)(court refused enforcement of arbitration award directing the parties to negotiate the rate of a travel allowance bebecause the award was not authorized by the collective bargaining agreement.)

The district court acknowledged the Employer's contention that 'in making his award, Arbitrator Warns relied in part on certain policies of the Labor-Management Relations Act and on the decisions of other arbitrators in similar actions, rather than basing his award solely on the language of the contract at issue." The court responded by quoting Enterprise Wheel, supra, for the proposition that an ambiguous opinion accompanying an arbitration award will not prohibit enforcement of the award. Enterprise

Wheel, supra, 363 U.S. at 598-99.

> While we adhere to the Supreme Court's admonition in Enterprise Wheel in appropriate cases, Amoco Oil Co., supra, 548 F.2d at 1294-95, this is not such a case. We do not regard it as necessary to discuss the arbitrator's reasoning because we find that the award itself demonstrates an infidelity to the plain restrictive terms of the contract." (A64-65)

After deciding that the interim award requiring "impact" negotiations went beyond the negotiating requirements set forth in the contract, the Court of Appeals held that the totality of Part 3 of the award, including the continuing jurisdiction of arbitration proceedings over the merits of the dispute, was unenforceable. (Decision of Court of Appeals, A 66) The Court of Appeals made no reference to Section 3 of the agreement, recognizing the Union as the exclusive bargaining representative.

In the Petition For Rehearing before the

Court of Appeals, the Union focused on the fact that the Petition before the District Court sought only a return to arbitration, the negotiating process having been exhausted. In denying rehearing, the original panel of the Court of Appeals restated that all of Part 3 of the Warns' award was "invalidated", leaving ambiguous whether the Petitioner was now compelled or could start the entire grievance process all over again on a contract issue initiated in February, 1976.

REASONS FOR GRANTING THE WRIT.

We have detailed the sequence of events and decisions in this collective bargaining dispute not to suggest that the Supreme Court consider a different contract interpretation than that advanced by the panel of the Court of Appeals. Rather, we desire to persuade the Supreme Court that it is now necessary to further delineate the scope of judicial

review of labor contract disputes which are subject to binding arbitration. This case makes evident that the Court's admonition to defer to arbitration when the arbitrator's decision and remedy draw its "essence" from the agreement, does not have a general understanding among the federal judiciary. As long as there continues to be a lack of a common framework for judicial review, the intent for arbitration to be an expeditious, relatively inexpensive and binding process for the peaceful resolution of labor disputes is thwarted. United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

The existing conflict among the judiciary as to the scope of their review authority is

mirrored in the subject litigation. Apparently all of the judges recognized that the union has raised an issue subject to binding resolution through arbitration. The District Court concluded, pursuant to Enterprise Wheel, supra, if the arbitrator's interim award was ambiguous, that is not a sufficient reason to halt the arbitration process to effect a final resolution of the merits of the union's grievance. (A40) The District Court was satisfied that the arbitrator's use of the term "impact", in describing the range of negotiations to be pursued between the parties, must be understood in light of the contract's specific requirements to negotiate in Section 4 of the agreement, as reflected in the arbitrator's entire opinion.

A panel of the Court of Appeals, also relying on Enterprise Wheel, chose to

interpret the arbitrator's use of the term "impact" encompassed elements of negotiations beyond the requirements of Section 4 of the agreement and then concluded that the arbitrator did not draw his conclusions "essence" from the agreement. Apparently, three other Judges of the Seventh Circuit question whether the Supreme Court's decision in Enterprise Wheel contemplated that the scope of judicial review should include the court's independent interpretation of an award and relevant contract provisions. (Decision of Court of Appeals, A65, and noted positions of Chief Judges Swygert and Cudahy, Denial of Petition for Rehearing, F.n. 1, A68 .)

We submit that the decision of the Court of Appeals is something more than a "judgment call" by a single panel of judges reviewing an arbitrator's award. The decision requires the broadest concept of judicial

authority in implementing the Supreme Court's standard in the "Steelworker Trilogy" of cases that judicial review was limited to a determination of whether an arbitrator's decision reasonably is drawn from "the essence" of the agreement and within the arbitrator's exercise of equitable remedial authority. In this case, the Court of Appeals has assumed that its authority, in implementing the standards of judicial review set forth in the "Trilogy" include its own construction of contract language, the intent of language employed by the arbitrator and the appropriate remedy.

The need for direction from the Supreme Court as to the conditions in which a reviewing court can determine that an arbitrator's decision is or is not drawn from the essence of the contract is of current, vital importance. This need has been forcibly and

cogently advanced by Professor Lewis B. Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review (Vol. 80, Columbia Law Review, p. 267 (1980). Note also, St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 75 Michigan Law Rev. 1137 (1977).

We submit that the scope of review employed by the Court of Appeals in the subject case is in conflict with a much more limited reading and implementation of Enterprise Wheel by other judges of the United States Courts of Appeal. In Boise Cascade Corp. v. United Steelworkers, 588 F.2d 127 (C.A.5, 1979), cert. den'd 444 U.S. 830 (1979), the Fifth Circuit upheld the arbitrator's interpretation of ambiguous contract language in a wage dispute during the term of the agreement. Citing Enterprise Wheel, Judge Wisdom

opinioned that the judicial review conceived by the Supreme Court was limited to "...calling for vacation of an arbitrator's award only when it is 'without foundation in reason or fact.' Machinists District No. 145 v. Modern Air Transport, Inc., 5 Civ. 1974, 495 F.2d 1241, 1244, cert. denied, 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 644." (588 F.2d 129) (Cf: Torrington Co. v. Metal Products Workers, 362 F.2d 677 (C.A.2, 1966) for a contrary result. In City Electric, Inc. v. Local Union 77, IBEW, 517 F.2d 616 (C.A.9, 1975), cert. den'd 423 U.S. 894, the bargaining agreement contained no reference to an employee benefit which the arbitrator held was subject to negotiations, unlike the specific procedures for dispute resolution in Section 4 of the subject contract. See also, Raymond L. Hogler, Industrial Due Process and Judicial Review of Arbitration Awards, 31

Labor Law Journal p. 570 (1980), comparing the conflicting application of the Enterprise Wheel, supra, standards of judicial review between the Tenth and Eighth Circuit Courts of Appeal in Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (C.A. 10, 1977); and Coca-Cola Bottling Co. v. Teamsters, 613 F.2d 716 (C.A.8, 1980).

The conflicting view of the scope of judicial review is highlighted by another decision from the Seventh Circuit, with Judges Cudahy and Swygert in the majority, upholding an arbitrator's award reinstating to employment discharged employees, although the arbitrator had initially found a technical violation of work rules by the employees. F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, 629 F.2d 1204 (C.A.7, 1980). Citing Enterprise Wheel, Judge Cudahy noted that it was not up to the court to pass upon the

"propriety" of the arbitrator's reasoning, but only to determine if the arbitrator's interpretation and application of the agreement proceeds "in some rational manner...derived from the agreement." (629 F.2d 1215)

The Court of Appeals for the Third Circuit has utilized the standard of whether the arbitrator has engaged in "manifest disregard of the agreement" in implementing the principles of judicial review set forth in Enterprise Wheel. Johnson Bronze Co. v. United Auto Workers, 621 F.2d 81 (C.A.3, 1980).

By holding that Arbitrator Warns' decision was not even ambiguous, the Court of Appeals also avoided the approach taken by other Courts of Appeal to remand to the arbitrator for clarification or further proceedings rather than imposing the court's own construction.

The result of the Court of Appeals' action

in this case is to render five years of time consuming grievance processing, arbitration and post-arbitration litigation an expensive nullity for the Union and its membership. (Cf: for a contrary result, Enterprise Wheel, supra; Warehousemen v. Standard Brands, Inc., 579 F.2d 1282 (C.A.5, 1978); Steelworkers v. W.C. Bradley Co., 551 F.2d 72 (C.A.5, 1977); Hart v. Overseas National Airways, 541 F.2d 586 (C.A.3, 1976); and International Brotherhood of Electrical Workers v. Olin Corp., 471 F.2d 468 (C.A.6, 1972).

This case is most appropriate for a grant of a Writ of Certiorari. This Petition not only presents an opportunity to correct error, but to advance significant guidelines for the courts' role in reviewing or interpreting an arbitrator's construction of an agreement, the terminology of his award, the scope of the arbitrator's remedial authority

in attempting to resolve a significant contract dispute.

We quote from Professor Kaden's recent article when he urged the Supreme Court to return to the subject matter of the "Steelworker Trilogy" by selective grants of certiorari in order to "...further elaborate a theory of national labor policy applicable to collective bargaining agreements....":

> "Occasional confusion and aberrational decisions by the lower federal courts concerning review of arbitration awards are not in themselves intolerable. Recently, however, changes elsewhere in the law affecting the labor contract, the bargaining relationship, and the arbitrator's role have combined to heighten the frequency of conflict between courts and arbitrators. This mounting judicial intervention proceeds in contexts where judges still lack the moorings of 'reasons that in their generality and their neutrality

transcend any immediate result."
80 Col.L. Rev. 277.

Respectfully submitted,

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Attorneys for Petitioner.

ARBITRATION AWARD

In the Matter of:

NEWSPAPERS, INC.,

and

MILWAUKEE TYPOGRAPHICAL UNION NO. 23

FOR THE COMPANY:	David W. Croysdale, Attorney
	George D. Cunningham, Attorney
FOR THE UNION:	Gilbert A. Cornfield, Attorney
	Frank Guskey, Jr., President
	Albert J. Van Boxel, Secretary-Tresurer
BOARD OF ARBITRATION:	Robert A. Kahlor, Company Member
	Eugene J. Cuske, Company Member
	Albert J. Van Boxel, Union Member
	Frank Guskey, Jr., Union Member
	Carl A. Warns, Jr. Louisville, Kentucky Impartial Chariman

By the terms of the contract between Newspapers, Inc., hereinafter called "the Company," and the Milwaukee Typographical Union No. 23, hereinafter called "the Union," there is provided a grievance procedure including arbitration. Accordingly, the parties mutually selected Carl A. Warns, Jr., Louisville, Kentucky, as Impartial Chairman of the Board of Arbitration. Hearings were held in Milwaukee, Wisconsin, on December 14, 1977, February 3, 1978 and May 11, 1978. Equal opportunity was given the parties for the preparation and presentation of evidence, examination and cross-examination of witnesses and oral argument. A transcript was made of the evidence and post-hearing briefs were filed.

OPINION OF THE CHAIRMAN

I will not burden this Opinion with defining the various terms used--whether they relate to equipment or process. They have been adequately explained to the Chairman at the hearings, by observation, in the exhibits and in the briefs. All parties to whom this Opinion and Award are addressed are obviously knowledgeable of the subject matter involved. The discussion and analysis will accordingly be confined to the relationship between those items of equipment and process as they relate to the mutual expectations from the negotiated contract. The precedent effect of the Solomon Award will be examined.

The Union provides the framework of analysis as follows: "The dispute between the parties is not whether the Hendrix system should be introduced, but the question of the

right of the Union to negotiate over its impact and/or the scope of the jurisdictional language of the collective bargaining agreement" (from the Union's Brief, pp. 2-3).

The Company poses this issue: "Whether the Company's introduction and use of the electronic text editing system ('VDT System') violates the contract?"

The following exchange of correspondence between the parties eventually led to the present arbitration:

"February 27, 1976

"Mr. E.J. Cuske, Vice-President
Journal Company
333 West State Street
Milwaukee, Wisconsin 53203

"RE: Video Display Terminals

"Dear Gene:

"It has come to my attention that Newspapers, Inc., has either in the plant or on order a number of Video Display Terminals. Because these machines can be used for composing room work and provide

"input to the computer, the union desires to envoke Section 3 of the current Working Agreement.

"Union members on the Joint Standing Committee will be Tim Maciolek and Rodger Maerder. At your earliest convenience, please advise me of a date to meet.

"Sincerely,

signed/Robert McGarry
President"

(Joint Exhibit #2)

"March 8, 1976

"Mr. Robert McGarry, President
Milwaukee Typographical Union No.23
1012 N. Third Street
Milwaukee, Wisconsin

"Re: Video Display Terminals

"Dear Bob:

"This is in response to your letter of February 27, 1976, and our more recent telephone conversation regarding the subject.

"While the company denies any alleged violation of the current collective bargaining agreement in this matter, I feel it would be mutually beneficial for the

"parties to meet in order to review the anticipated installation of the electronic text editing system. . . ."

(Joint Exhibit #3)

"June 16, 1976

"Mr. E.J. Cuske, Vice-President
Journal Company
333 W. State Street
Milwaukee, Wiconsin 53203

"Dear Mr. Cuske:

"After careful consideration the union charges Newspapers, Inc. with contract violation with the introduction and use of the CRT-VDT system.

"Specifically, we charge you with violation of Sections 4 and 37. . .

(Joint Exhibit #4)

The following contract provisions are in issue:

RECOGNITION

"Section 3. The Publisher hereby recognizes the Union as the exclusive bargaining representative of all employes covered by this agreement. The words 'employe'

"and 'employes' when used in this contract apply to journeymen and apprentices."

JURISDICTION

". . . Jurisdiction of the Union and the appropriate unit for collective bargaining is defined as including all Composing Room work including classifications such as hand compositors, typesetting machine operators, copy cutters, makeup men, bank men, mark-up men, paste make-up men, proof press operators, proofreaders, full time copyholders, machinists for typesetting machines, operators and machinists on all devices which case or compose type or slugs, or film, operators of a tape perforating machines and recutter units and monitors for linecasting machines operating from tape, for use in composing or producing type, and operators of all photo-typesetting machines (such as Photosetter, Photon, Linofilm, Monophoto, Coxhead Liner, Filmotype, Typro and Hadego). The advent of the photo composition process has created additional paste makeup and has brought it within the scope of Composing Room work. Journeymen and apprentices are doing paste makeup on the product of photo composing machines. As the use of paste makeup expands and as proficiency is gained by

"Composing Room personnel, the volume of paste-up work, including proofing, waxing and paste makeup with reproduction proofs, and the processing of the product of photo composing machines (including proofs of type, hand lettered, illustrative border, and decorative material) and the ruling, photo-proofing, correction, alteration and pasting into position of copy material (including photostats, prints and positive proofs of illustrations) will increase in the Composing Room. The Publisher agrees not to grant jurisdiction covering the work above mentioned to any other Union."

". . . In the event of the introduction into Composing Room work of any process, machinery or equipment which functions as a substitute for, or evolution of, the typesetting and typecasting processes that were in use at the date this contract became effective, all questions concerned with the method of operation, the complement of men required or the retrainin of affected employes shall be determined by the Joint Standing Committee, which shall give due consideration to priority with regard to any question of retraining presented to it."

"The Publisher agrees to notify the Union in advance of any such changes,

"and to process any dispute promptly if the Union objects to the method of operation.

"The Joint Standing Committee and Arbitration Board provided for in Section 7 shall be bound by the agreement of the parties hereto that all work on any such process, machinery or equipment shall be performed only by journeymen or apprentices."

"It is agreed that when a computer is used for composing room work, the jurisdiction of the Union includes the preparation of all input and handling of output, operation of the computer and all input and output devices, programming (except that programming which is provided by the manufacturer or lessor as part of the standard services for the purchase or lease of the equipment) and maintenance of all the foregoing equipment and devices (except maintenance which is provided by the manufacturer or lessor as part of the standard services for the lease or purchase of the equipment)."

"Section 37. In the event the regular news wire of the Associated Press and/or United Press International is received over the regularly leased wires of the particular wire service in the form

"of tape, such tape may be used. It is agreed that all other tape must be perforated by employes covered by this agreement."

Arbitrator Solomon had before him in his decision of June 21, 1974, the Company's introduction and use of the scanner system. I quote from his Opinion:

"It is indisputable that with the introduction of the scanner system into the composing room it is now possible to achieve the perforation of unjustified tape without the utilization of the TTS operator. The effect of the use of the scanner system when so utilized inevitably results in substantially reducing the work opportunities of the TTS operators. . . ."
(Op. 6)

Arbitrator Solomon found no violation of the negotiated work jurisdiction provision, "when a computer is used for composing room work, the jurisdiction of the Union includes the preparation of all input and handling of output, operation of the computer and all

input and output devices. . . ." The Arbitrator saw no contractual significance in the fact that with the introduction of the scanner it was necessary, if that equipment was to be used, that the Editorial Department use a specifically equipped IBM Selectric typewriter, special bond paper, and special aqua blue pens to note corrections. Whereas previously, with the exception of contractually negotiated excepted tape, copy or hard copy with typesetting instructions was sent to the composing room where the unit Teletypesetter operating the TTS machine performed the necessary keyboarding, producing the perforated unjustified tape, fed into a tape reader, then to the production computer to justified tape, then to another tape reader and on to the linecasting machines or the photo composition machines. Scanner ready copy, using the special equipment by the

non-unit editorial department, eliminated the need of having the copy perforated into unjustified tape by the TTS operator.

The Arbitrator concluded that what occurred here was simply a legitimate exercise of Management's right to use any "type of material, tools or other equipment within its editorial or other departments, ergo the utilization of the IBM Selectric, as equipped, new pens, nad bond paper" and that absent express limitations, and there were none here, Management did not violate the contract. He dismissed the Union's claim that the IBM Selectric is an "input device" in the scanner system is the Optical Reader, operated by unit employees. He also rejected the Union's contention that the-then Section 40 was violated. The scanner is operated by unit employees, and non-unit employees do not perforate tape.

One of the aspects of this arbitration that is especially interesting is that the Solomon Award, between these parties, is at variance in part with, if not the letter, at least the spirit, of all of the other arbitration cases cited. The Company asserts that "The Solomon Award is Final and Binding Precedent for this Proceeding," and "Solomon resolved the issues in this proceeding." Company Counsel compared the significant points in that Award and in this current proceeding:

* * *

> "Editorial Department use of specially designed selectric typewriters, aqua pens, and bond paper was challenged in the scanner case; Editorial Department use of video display terminals and related computer apparatus is challenged here. Editorial Department keyboarding on selectric typewriters was claimed to be 'preparation of input' before Solomon; Editorial Department keyboarding on video display terminals is now claimed as 'preparation of input' here.

"Reduction of Composing Room personnel due to the scanner was argued as evidencing 'transfer of Composing Room work' in the scanner case; the impact of the VDT system on Composing Room personnel is asserted for the same purpose in this case. Indeed, even the 'tape clause' is brought back for one more turn on the arbitral wheel of fortune.

"Each of these Union positions was forthrightly rejected by Arbitrator Solomon in his thoughtful and comprehensive scanner decision. Precisely the same conclusions apply to the issues in this proceeding."

* * *

"The Editorial Departments' freedom to prepare and edit copy in whatever manner and with whatever tools the Company determines is no more contractually constrained today than it was four years ago when the Solomon decision was issued. The VDT system is no more and no less than a technologically more advanced tool for composing and editing copy. The fact that copy prepared and edited with VDT

system may be 'fed into and understood by' the CRIP is in full accord with the contract."

* * *

"Computers, video display terminals, and typewriters are common tools within the Company, and indeed, within the business world at large. 'Keyboarding' of typewriters occurs throughout the Company. Video display terminals are used in many departments including the Business Office, Composing Room, and Editorial Departments. Obviously, several distinct and independent computer systems exist within the Company. The mere fact that Editorials Department employees 'keyboard' operate video display terminals, and utlize computer technology is entirely irrelevant.

"What is relevant is the function and purpose for which these tools are used. The conclusion compelled by the record evidence is that these tools are used by Editorial Department employees to prepare and edit copy and to issue appropriate typesetting instructions.

"Conversely, these tools are not and cannot be used to generate paper tape or, put differently, these tools do not substitute for the scanner or the teletypesetter in producing paper tape. Quite simply, by eliminating the need for paper copy, the need for converting paper copy to paper tape is also eliminated.

"In the same way that reporters and editors keyboarded copy on typewriters, the same persons keyboard copy on video display terminals. In lieu of delivering or transporting paper copy by hand, or pneumatic tube, copy may now be instantaneously transmitted by electronic impulse through the editorial computer and its related wiring. In essence, the VDT system is a substitute for previous Editorial Department processes and in no way is a substitute for any typesetting or typecasting process."

As to the Solomon analysis of the Section 37 claimed violation:

"5. The 'tape clause' is inapplicable to this proceeding. The Union misguidely invokes Section 37 of the contract which requires that all tape

"must be perforated by Composing Room employees except certain tape received from wire services. Solomon rejected a similar argument in the scanner case holding:

'Section 40 [Section 37 in the present contract] does not here apply, for it is the scanner serving as a substitute for the TTS machine which produces unjustified tape, and since the scanner is operated by unit employees, non-unit employees do not perforate tape and no contractual violation is established.' (Employer Exh. 10, pg. 18)

"Exactly the same holding applies in this case. The record evidence is utterly void of any showing that tape is perforated anywhere except in the Composing Room. Indeed, perforation of paper tape is not even at issue."

On the other hand, the Union introduced decisions from other Arbitrators who took a different approach. In the Beacon Journal Publishing Co. case 13 LA 453, Arbitrator Kates, with a similar question

of preparing scanner ready copy to the composing room by non-unit personnel, stated that he reached a conclusion "partially different from Arbitrator Solomon's and partially in accord with that of Arbitrator Russell A. Smith in the Detroit News and Detroit Typographical Union No. 18 (June 6, 1973). . . ." The Union refers also to a decision by William Easton in the Times-Herald, Vallejo, California, and Bay Area Typographical Union No. 21, Aurora Beacon-News and Chicago Typographical Union No. 16, Peter Kelliher, Chairman, Decatur Herald and Review, Inc., and Central Illinois Typographical Union, Arthur Malinowski, Arbitrator, and the implementing decision of Louis Crane in the Detroit News and Detroit Typographical Union No. 18 case.

All of the Arbitrators referenced above are of outstanding reputations. It

must be admitted that there is still a little of the "old school tie" attitude among Academy arbitrators with long experience. Yet the Company makes a strong point when they urge this Board to consider the Solomon Award as precedent. Preliminarily, it must be said the "final and binding" mandate of the contract concerns only the observance of the award by the parties themselves; it does not mean that it binds a different arbitrator with a new case although the issue is the same. In some umpireships we follow the "clear error rule," that is, we do not reverse an earlier decision unless it is shown the ruling is in "clear error". Apparently, Arbitrator Solomon was not the permanent umpire. Of course, we pay respect to well-reasoned opinions as well as to the practical point that if there is to be stability in relationship, earlier decisions cannot be ignored

merely because a subsequent arbitrator feels the need to substitute his judgment for that of the other arbitrator. There must be some meaningful basis to reverse under the same contract, on the same issue, between the same parties.

In my opinion, Arbitrator Solomon resolved some but not all of the issues. I note again the Union's realistic statement of the issue: "The dispute between the parties is not whether the Hendrix system should be introduced, but the question of the right of the Union to negotiate over its impact and/or the scope of the jurisdictional language of the collective bargaining agreement."

The Union does have the right to negotiate over the impact and the "commingled" relationship between the Hendrix system and the jurisdiction of the "Composing

Room." I find nothing in the Solomon Opinion or Award which forecloses this finding. I also agree with the Union that the words "Composing Room," historically understood, do not necessarily imply that the defined jurisdiction of the Composing Room and the Joint Standing Committee regarding changes are limited to a prescribed physical area. "Function and purpose" emphasized by the Company, are utilitarian, to be viewed in the context of the practical setting in which they apply. Section 4 is more than a listing of unit classifications--the words "in the event of the introduction into Composing Room work of any process, machinery or equipment which functions as a substitute for, or evolution of, the typesetting processes that were in use . . ." delegates to the Joint Standing Committee the responsibility of accomodating Management's legitimate right

and responsibility to keep abreast of new developments in order to survive in the marketplace with the right of the members of the bargaining unit to maintain their productive role in the enterprise and to support their families.

To repeat, I do not interpret the Solomon Award as informing Management that they are under no duty to bargain about the impact of technological change which affects the bargaining unit. A careful study of that Award, and I have given it exhaustive review, reflects that Solomon was confirming Management's right to introduce new equipment into the Editorial Department although that equipment had an incidental cause and effect on the Composing Room. He did not find that preparing scanner ready copy by the Editorial Department a basis for giving the Composing Room "jurisdiction,"

that is, preventing the Editorial Department from using the new typewriters for the work normally transacted. He did not consider the use of the new Selectric with attendant equipment computer "input"; he did not find that "tape" in violation of Section 40 was prepared by the non-unit personnel. Therefore, no jurisdiction, no limitation on Management's right to assign. But as I said earlier, I interpret Section 4 as more than a definition of current rights and duties in the legal model, although it is that; it informs the reader very clearly that both sides recognize the complexity of the relationship with its equally complex challenges in the tradition of an ongoing relationship. And in this general connection I cannot overlook the statutory backdrop to the bargaining process and the history of this industry regarding the mandate of Section 8(a) (5) and its

related Section 8(d). The case of National Labor Relations Board v. Columbia Tribune Publishing Co., 8th Circuit (1974), 73 CCH Lab. Cas., Par. 14,480 involved this industry and the duty to bargain over job changes affecting the composing room. The Court referred to Rochet d/b/a The Renton News Record, 136 NLRB 1294, a similar case. The Court reaffirmed that "the effect of automation on the bargaining unit was a mandatory subject of collective bargaining." Although the facts in Columbia concerned the change from hot metal to the cold type process, the significance of that precedent with its roots in Fiberboard Corporation v. NLRB, 379 U.S. 203, a contracting out case, is that impact as well as work assignment is a term and condition of employment. The impact here is real; the Company concedes that the function of copy cutter, scanner operator, teletypesetter

operator and proofreader are "rendered unnecessary by reason of the VDT system" (Company Brief, p. 26). Job elimination is within the scope of mandatory bargaining. The Board has said:

> "The elimination of unit jobs, albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a) (5) of the Act." Town and Country Manufacturing Co. 136 NLRB 1022, enforced 316 F. 2d 846.

It is true that Joint 1a reflects a supplement to the 1975 Agreement in providing certain work guarantees to situation holders. But there is no evidence that this agreement is the quid pro quo for the impact on the bargaining unit of the Hendrix system.

In summary, I find that the introduction of the Hendrix system with its impact

on the available and changed job elements in the "Composing Room" establishes an appropriate basis for bargaining.

A W A R D

1. I accept the Solomon Award for the purpose of confirming Management's right to keep abreast of technological advances in the industry and to make appropriate assignments.
2. I find, however, that the introduction of the Hendrix system, a technological change, has sufficient impact on the job elements of the Composing Room as to warrant the imposition of a duty to bargain about such impact.
3. The parties are directed to bargain in good faith according to the guidelines of Sections 8(a) (5) and 9(b) (3) of the National Labor Relations Act, As Amended.

If the parties are unable to reach agreement within 60 days of the receipt of this Award, the matter shall be returned to a mutually selected Arbitrator, or if none can be agreed upon, to this Arbitrator for a specific ruling. This ruling shall be made within 30 days of the close of the hearing.

March 29, 1979 /s/Carl A. Warns, Jr.
Impartial Chairman

( ) concur ( ) dissent Robert A. Kahlor,
Company Member

( ) concur ( ) dissent Eugene J. Cuske,
Company Member

( ) concur ( ) dissent Albert J. Van Boxel,
Union Member

( ) concur ( ) dissent Frank Guskey, Jr.,
Union Member

Arbitration Matter Between

NEWSPAPERS, INC.

and

MILWAUKEE TYPOGRAPHICAL UNION NO. 23

Position and Opinion of Company Members

of the Board of Arbitration

Re Arbitration Award Issued by

Carl A. Warns, Jr., Impartial Chairman

Notice is given that Mr. Richard A. Williams is substituted for Mr. Eugene J. Cuske as one of the Company Members of the Board of Arbitration by reason of Mr. Cuske's change in employment. Accordingly, the position and opinion stated below is provided by Company Members Robert A. Kahlor and Richard A. Williams.

The Company Members respectfully concur and dissent as follows regarding the award issued March 29, 1979 by the Impartial Chairman.

1. The Company Members concur with the first paragraph of Mr. Warns' award which states as follows:

"I accept the Solomon Award for the purpose of confirming Management's right to keep

"abreast of technological advances in the industry and to make appropriate assignments."

2. The Company Members dissent to the second and third paragraphs of Mr. Warns' award which state as follows:

"I find, however, that the introduction of the Hendrix system, a technological change, has sufficient impact on the job elements of the Composing Room as to warrant the imposition of a duty to bargain about such impact.

"The parties are directed to bargain in good faith according to the guidelines of Sections 8(a)(5) and 9(b)(3) of the National Labor Relations Act, As Amended. If the parties are unable to reach agreement within 60 days of the receipt of this Award, the matter shall be returned to a mutually selected Arbitrator, or if none can be agreed upon, to this Arbitrator for a specific ruling. This ruling shall be made within 30 days of the close of the hearing."

In reaching their decision, the Company Members have very carefully and deliberately considered Mr. Warns' award and his forthright and perceptive reasoning in support of his award. The Company Members further recognize the complexity and importance of the issues submitted to Mr. Warns and very much appreciate the thoughtful and concerned perspective he has brought to the arbitration matter.

The Company Members are compelled, however, to dissent to paragraphs two and three for the reasons summarized below:

1. The contract does not contain any clause or provision requiring either party to negotiate over the effects of a technological change.

2. The first paragraph of the Arbitrator's award, having held no violation of the work jurisdiction provisions of the contract, must govern and accordingly does not give rise to a remedy.

3. Neither the contract nor law governing the contract provides or permits an arbitration board to invoke or enforce provisions of the National Labor Relations Act ("NLRA").

4. Even under the NLRA, the maximum legal duty imposed

> is the duty to bargain with the clear statutory provision that agreement on any specific issue may not be mandated. Accordingly, neither the contract nor law governing the contract empowers an arbitration board to exceed the requirements of NLRA and require that agreement be reached and, even more, that agreement be reached within a prescribed time period.

It is the position of the Company Members that paragraphs two and three of Mr. Warns' award exceed the authority of the arbitration board and accordingly may not be enforced. However creative and sensitive to the perceived equities of the parties, the directives of these paragraphs are made without contractual or legally binding authority.

The Company Members, like the Impartial Chairman, are equally concerned about preserving a good faith and constructive labor realtionship. Issuance of this position does not foreclose, in the opinion of the Company Members, discussions between the Company and the Union or, for that matter, even negotiations between the Company and the Union over the effects, if any, of the technological change. Indeed, it is fully consistent with the NLRA that parties may voluntarily and mutually engage in negotiations even where not required by law or contract.

Assuming a good faith and responsible position by the Union, the Company

Members are fully prepared to recommend that such discussions or negotiations occur.

Respectfully submitted,

/s/ Robert A. Kahlor

/s/ Richard A. Williams

cc: Frank Guskey
Al Van Boxel
Gilbert Cornfield
David Croysdale

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

MILWAUKEE TYPOGRAPHICAL
UNION NO. 23,

Petitioner,

v.

NEWSPAPERS, INC.,

Respondent.

DECISION AND ORDER

Civil Action
No. 79-C-649

This is an action brough pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, for enforcement of an arbitrator's award made pursuant to the provisions of a collective bargaining agreement in effect between the petitioner Milwaukee Typographical Union No. 23 and the Respondent Newspapers, Inc. The Respondent has moved the court to dismiss the petition on the ground that the arbitrator's award exceeded his authority

and is unenforceable. For the following reasons, the motion will be denied.

Paragraph five of Section 4 of the collective bargaining agreement provides:

> "In the event of the introduction into Composing Room work of any process, machinery or equipment which functions as a substitute for, or evolution of, the typesetting and typecasting processes that were in use at the date this contract became effective, all questions concerned with the method of operation, the complement of men required or the retraining of affected employees shall be determined by the Joint Standing Committee, which shall give due consideration to priority with regard to any question of retraining presented to it."

Section 7 of the agreement provides in part:

> " * * * To this [Joint Standing] committee shall be referred all questions that may arise regarding this contract or any alleged violation thereof, which cannot be settled otherwise. * * * If the committee does not reach an agreement within fifteen (15) days of the date of transmission of notice of difference, the questions in dispute shall, on request of either party to the agreement, be submitted to arbitration * * *. * * *"

The Petitioner represents employees in Respondent's Composing Room; it does not represent other of Respondent's employees. Sometime in 1976, the Respondent introduced certain technological changes into its Editorial Department which had an undisputed impact on the work performed in the Composing Room. Petitioner filed a grievance relating to the impact on the job elements in the Composing Room caused by said change. On March 29, 1979, Arbitrator Carl A. Warns, Jr., issued a decision upholding the Respondent's right to make the technical changes, but concluding:

> "2. I find, however, that the introduction of the Hendrix system, a technological change, has sufficient impact on the job elements of the Composing Room as to warrant the imposition of a duty to bargain about such impact.
>
> "3. The parties are directed to bargain in good faith according to the guidelines of Sections 8(a)(5) and 9(b)(3) of the National Labor Relations

> Act, As Amended. If the parties are unable to reach agreement within 60 days of the receipt of this Award, the matter shall be returned to a mutually selected Arbitrator, or if none can be agreed upon, to this Arbitrator for a specific ruling. This ruling shall be made within 30 days of the close of the hearing."

The respondent argues that having found no contract violation, the arbitrator was not free to impose a remedy for what he perceived as an inequity in the existing contract where the contract itself did not allow for such remedy. See, e.g., City Electric, Inc. v. Local Union 77, International Brotherhood of Electrical Workers, 517 F.2d 616 (9th Cir. 1975), cert. denied 423 U.S. 894, holding that an arbitrator may deal only with what exists in a contract and may not bring in ad hoc modifications. The respondent also argues that the third paragraph of the award is an interest arbitration provision of the type found to be impermissible in Milwaukee

Newspaper & Graphic Communications Union Local No. 23 vs. Newspapers, Inc., 586 F.2d 19 (7th Cir. 1978), cert. denied 47 U.S.L.W. 3636 (March 26, 1979). Finally, the respondent argues:

> "The fatal flaw in Petitioner's argument is the claim that the 'new process' clause [paragraph five of Section 4], which relates only to new technology in the composing room, also applies to technological change introduced into other departments of the Employer. Of equal importance is the fact that the 'new process' clause does not relate to the impact on the composing room of technology used in other departments. Instead, this clause requires arbitration with respect to only three narrowly defined questions: 'the method of operation, the complement of men required or the retraining of affected employees' arising from new composing room technology. Therefore, the 'new process' clause cannot be construed to require negotiation or arbitration over the impact on the composing room of technology in other departments of the Employer." (Emphasis in original.) Respondent's reply brief filed December 11, 1979, at p.3)

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960), states:

> "* * * the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

Arbitrator Warns found that the contract between petitioner and respondent did not prevent the respondent from introducing technological changes into its Editorial Department even if those changes had an impact on the Composing room. He also found, however, that the correct interpretation of paragraph five of Section 4 of the contract is not the interpretation argued for by the respondent and set forth above but rather:

> "* * * I also agree with the Union that the words 'Composing Room,' his-

> torically understood, do not necessarily imply that the defined jurisdiction of the Composing Room and the Joint Standing Committee regarding changes are limited to a prescribed physical area. 'Function and purpose' emphasized by the Company, are utilitarian, to be viewed in the context of the practical setting in which they apply. Section 4 is more than a listing of unit classifications--the words 'in the event of the introduction into Composing Room work of any process, machinery or equipment which functions as a substitute for, or evolution of, the typesetting processes that were in use . . .' delegates to the Joint Standing Committee the responsibility of accommodating Management's legitimate right and responsibility to keep abreast of new developments in order to survive in the marketplace with the right of the members of the bargaining unit to maintain their productive role in the enterprise and to support their families." (Arbitrator Warns' decision at p. 12)

The respondent concedes that the contract requires negotiation or arbitration over the method of operation, the complement of men required, or the retraining of affected employees arising from new Composing Room

technology. What constitutes "new composing room technology" is a matter of contract interpretation for the arbitrator and not for this court to decide. Once having decided that technological change in the Editorial Department was included within the spirit of that phrase, Arbitrator Warns was entitled to impose the remedy provided for in the contract when such change occurred.

The respondent points out that in making his award, Arbitrator Warns relied in part on certain policies of the Labor Management Relations Act and on the decisions of other arbitrators in similar actions, rather than basing his award solely on the language of the contract at issue. Again, as stated in United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, however at 597-598:

> "* * * an arbitrator is confied to interpretation and application of the collective bargaining agreement; he does

not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words menifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

"The opinion of the arbitrator in this case * * * is ambiguous. It may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of the submission. Or it may be read as embodying a construction of the agreement itself, perhaps with the arbitrator looking to 'the law' for help in determining the sense of the agreement. A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. Moreover, we see no reason to assume that this arbitrator

> has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration. * * *"

Finally, the case of Milwaukee Newspaper & Graphic Communications Union Local No. 23 v. Newspapers, Inc., supra, is not on point. In that case the Court held only that a union cannot insist to impasse during bargaining on the inclusion of an interest arbitration clause in a new contract. It did not hold that when such a clause is included in an existing contract, a party may be excused from complying with it.

For the foregoing reasons,

IT IS ORDERED that the motion of the respondent Newspapers, Inc., to dismiss the petition for enforcement of an arbitration award is denied.

IT IS FURTHER ORDERED that the petition for enforcement is granted, and that

the respondent Newspapers, Inc., is to comply forthwith with paragraph 3 of the arbitration award of Arbitrator Carl A. Warns, Jr., issued March 29, 1979.

Dated at Milwaukee, Wisconsin, this 31st day of January, 1980.

/s/ John W. Reynolds
John W. Reynolds,
Chief Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE TYPOGRAPHICAL UNION NO. 23, Petitioner,	)	
v.	)	DECISION AND ORDER
NEWSPAPERS, INC., Respondent.	)	C.A. No. 79-C-649

This is an action brought pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C. §185, for enforcement of an arbitrator's award made pursuant to the provisions of a collective bargaining agreement in effect between the petitioner Milwaukee Typographical Union No. 23 and the respondent Newspapers, Inc. Paragraph 3 of the award provided:

> "3. The parties are directed to bargain in good faith according to the guidelines of Sections 8(a)(5) and 9(b)(3) of the National Labor Relations Act, As Amended. If the parties are unable to reach agreement

> within 60 days of the receipt of this Award, the matter shall be returned to a mutually selected Arbitrator, or if none can be agreed upon, to this Arbitrator for a specific ruling. This ruling shall be made within 30 days of the close of the hearing."

On January 31, 1980, the Court entered an order denying the respondent's motion to dismiss the petition for enforcement of the award and ordering the respondent to comply forthwith with paragraph 3 of the award. That order has been appealed to the United States Court of Appeals for the Seventh Circuit.

Presently pending before this Court is respondent's motion for a stay of the order pending appeal. The respondent argues that the Court converted its Rule 12(b)(6) motion to dismiss into a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure without giving the respondent an opportunity to file evidentiary material, see Rull 56(c); that had respondent been advised of the Court's

intention it would have filed affidavits disputing the Court's statement on page 2 of its decision that "the respondent introduced certain technological changes into its Editorial Department which had an undisputed impact on the work performed in the Composing Room" and disputing that sixty days of bargaining had occurred under paragraph 3 of the arbitration award; and finally, that the respondent will suffer irreparable injury if a stay is denied because of the burden and expense of proceeding with arbitration, whereas petitioner will not be harmed if the stay is granted because the status quo will be maintained.

Rule 81(a)(3) of the Federal Rules of Civil Procedure provides that in proceedings under Title 9 of the United States Code relating to arbitration "these rules apply only to the extent that matters of procedure are not provided for in those statutes." In general, in

deciding a petition for arbitration, the Court's inquiry ends with determining whether the issues presented are on their face referable to arbitration under the parties' contract, and if so, whether the arbitrator's award draws its essence from the contract. Galt v. Libbey-Owens-Ford Glass Company, 376 F.2d 711, 714 (7th Cir. 1967); Butler Products Company v. Unistrut Corporation, 367 F.2d 733, 735 (7th Cir. 1966); Hamilton Life Insurance Company of New York v. Republic National Life Insurance Company, 408 F.2d 606 (2d Cir. 1969); Drake Bakeries Incorporated v. Local 50, American Bakery & Confectionery Workers International AFL-CIO, 370 U.S. 254, 256 (1962). Therefore with reference to the respondent's first argument that it would have filed affidavits stating that the technological changes in the editorial department had no impact on the work performed in the composing room, that issue was within the scope of the matters

for the arbitrator and not for this Court to decide. The Court's use of the word "undisputed" was perhaps unfortunate, but in any case the impact issue was one within the arbitrator's and not the Court's jurisdiction, was decided by the arbitrator adversely to the respondent, and is not subject to revision by the Court. As stated in International Union of Operating Engineers, Local Union No. 139 v. Carl A. Morse, Inc., 529 F.2d 574, 581 (7th Cir. 1976):

> "The employer has complained that the proceedings below partook of the nature of a motion for summary judgment, but deprived it of the opportunity to present affidavits in support of its defenses in opposition to arbitration. We have assumed, for purposes of this decision, that the employer's positions can be adequately backed up by evidence sufficient to create genuine issues of fact. But those issues are to be resolved by the arbitrator, not by the court. Whether under summary judgment procedures or upon a petition to compel arbitration under the United States Arbitration Act, 9 U.S.C. §4 (1925), the issues open for judicial consideration are limited and rarely factual.

> Here they raise only questions of law, and were properly ruled upon by the District Court. [Citations omitted.]"

The respondent's second claim, that it would have submitted affidavits disputing petitioner's contention that sixty days of bargaining had taken place pursuant to paragraph 3 of the arbitration award, has more merit in that had the Court's attention been drawn to that claim, it might then have issued a more narrowly drawn order of compliance than it did. As stated in the January 31, 1980 decision and order, however, the Court is satisfied that the relief set forth in paragraph 3 of the award was within the arbitrator's power. The question raised by the respondent's second claim therefore is whether compliance with the award broke down prior to the completion of the sixty days of bargaining, or whether it broke down after the bargaining at the point where the matter should have been returned to an arbitrator for a specific ruling.

Respondent complains that the Court accepted petitioner's assertion that the sixty days of bargaining had been completed. The Court's order, however, merely required the parties to comply forthwith with paragraph 3 of the award and did not make a finding as to the degree of compliance which had already been achieved. Thus the order did not by its terms accept the petitioner's claim. Had respondent chosen to, it could have moved the Court for a clarification of the order and filed its affidavits with respect to the bargaining issue. That it did not is unfortunate because of the resulting ambiguity in the order, assuming the parties cannot now agree on the extent of the compliance which has been achieved to date, but that ambiguity alone, which is still subject to clarification by this Court upon request of a party, see Rule 62(c) of the Federal Rules of

Civil Procedure,* does not require that the order be stayed.

Finally, for the reasons set forth above and in its January 31, 1980 decision and order, the Court is not persuaded that respondent will prevail on the merits of its appeal, nor is it persuaded that the respondent will suffer irreparable injury if the stay is denied. The Court's January 31, 1980 order does no more than require the respondent to perform the bargain it mad when it entered into a collective bargaining agreement with the petitioner providing for the resolution of disputes by arbitration. Furthermore, federal policy favors arbitration in cases where the parties have contracted for it because of its relative economy and swiftness,

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* Title 9 U.S.C. does not specify the procedure on appeal of an order granting a petition to compel arbitration and therefore Rule 62 of the Federal Rules of Civil Procedure applies. See Rule 81(a)(3).

and the Court is unpersuaded that the burden and expense of complying with the arbitrator's award will be, as respondent claims, excessive.

IT IS THEREFORE ORDERED that the motion of the respondent Newspapers, Inc. for a stay pending appeal is denied.

Dated at Milwaukee, Wisconsin, this 31st day of March, 1980.

/s/ John W. Reynolds
John W. Reynolds,
Chief Judge

In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1272

MILWAUKEE TYPOGRAPHICAL UNION NO. 23,

Plaintiff-Appellee,

v.

NEWSPAPERS, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 79-C-649—John W. Reynolds, *Judge.*

ARGUED SEPTEMBER 26, 1980—DECIDED JANUARY 23, 1981

Before PELL, *Circuit Judge*, SKELTON, *Senior Judge*,* and WOOD, *Circuit Judge*.

PELL, *Circuit Judge*. This action arose from a labor dispute between Newspapers, Inc. (Employer), a newspaper publisher in Milwaukee, Wisconsin, and its labor organization representing the Employer's composing room employees, Milwaukee Typographical Union No. 23 (Union). In 1976, the Employer installed a video display terminal (VDT) system in its editorial departments which introduced electronic preparation, editing, and transmission of newspaper copy. The Union sought arbitration claiming that the introduction of the VDT system fell within the collective bargaining agreement's

* Senior Judge Byron G. Skelton of the United States Court of Claims is sitting by designation.

jurisdictional language, thereby compelling the Employer to bargain about the system's impact. The dispute was submitted to arbitration. On March 29, 1979, Arbitrator Warns decided that while the Employer was entitled to install the VDT system, it was obligated to negotiate with the Union regarding the system's "impact" upon composing room work. The arbitrator directed the parties to bargain and to return to arbitration after 60 days if they could not reach an agreement.

On August 17, 1979, the Union petitioned the district court for enforcement of the award pursuant to the Labor-Management Relations Act, 29 U.S.C. § 185, and the United States Arbitration Act, 9 U.S.C. §§ 1-14. In lieu of an answer, the Employer filed a motion to dismiss in accordance with Federal Rule of Civil Procedure 12(b)(6). The Union filed a reply to the Employer's motion and the Employer, in turn, filed a reply brief. No motion for summary judgment ever was filed.

In the district court's January 31, 1980, Decision and Order, the court denied the Employer's motion to dismiss and granted enforcement of the arbitration award. The Employer argues on appeal that the district court's judgment violated due process because the court converted the Employer's motion to dismiss into a motion for summary judgment without prior notice to the parties, and without affording the Employer an opportunity to file evidentiary material in accordance with Fed. R. Civ. P. 56.[1] Alternatively, the Employer contends that the arbitration award is unenforceable because the arbitrator exceeded his authority.

[1] While the Employer did not petition Judge Reynolds to set aside his order pursuant to Fed. R. Civ. P. 60, the Employer did raise this due process argument at the district court level in its brief in support of its motion for a stay pending appeal. The court denied that motion.

I.

The parties vigorously disagree on the applicability of the United States Arbitration Act to the facts of this case.[2] The Union argues that the Act applies and seems to theorize that Fed. R. Civ. P. 81(a)(3) preempts normal procedure under Rules 12(b) and 56. Rule 81(a)(3) stipulates that the Federal Rules of Civil Procedure apply to proceedings under the Arbitration Act only to the extent that matters of procedure are not provided for in that Act.

The Applicability of the Arbitration Act

As this court recently noted in *Teamsters Local 135 v. Jefferson Trucking Co.*, 628 F.2d 1023, 1026 (7th Cir. 1980), the circuits are divided over whether the Arbitration Act applies to collective bargaining agreements because § 1 of the Act explicitly excludes "contracts of employment of . . . workers engaged in foreign or interstate commerce" from the Act's coverage. District courts in this circuit, however, have applied 9 U.S.C. § 9 in proceedings to confirm arbitration awards made pur-

[2] In its complaint the Union sought application of both the Arbitration Act and § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. In its brief in support of its motion to dismiss, the Employer predicated jurisdiction solely upon the Labor-Management Relations Act, noting that "[s]ince it is uncontroverted that this Court has jurisdiction by reason of § 301, Petitioner's allegations respecting the United States Arbitration Act . . . are redundant and need not be considered." Contrary to the Employer's allegations on appeal, however, the Union's reply in the district court reiterated that it sought application of both Acts, thereby implicitly rejecting the Employer's narrowed interpretation.

The district court based its jurisdiction in its January 31, 1980, enforcement order explicitly upon § 301 without mentioning the Arbitration Act. Subsequently, in its order denying a stay pending appeal, in response to the Employer's contention that it was denied due process, the court again predicated jurisdiction on § 301. Although the court alluded to Rule 81(a)(3), its analysis suggested that the enforcement award was appropriate because no issue of material fact existed, not because Rule 81(a)(3) and Title 9 preempted Rules 12(b)(6) or 56.

suant to collective bargaining contracts. *Botica v. Floyd Steel Erectors, Inc.*, 485 F.Supp. 334 (N.D. Ill. 1980); *Teamsters Local 364 v. Ruan Transport Corp.*, 473 F.Supp. 298 (N.D. Ind. 1979). This court has held that the Act's exclusion relates only to workers in transportation industries. *Pietro Scalzitti Co. v. Int'l Union of Operating Engineers, Local 150*, 351 F.2d 576, 579-80 (7th Cir. 1965).

Even assuming that § 1 poses no bar in this case, the Employer nonetheless points out that § 9 of the Act allows enforcement of an arbitration order only "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration. . . ." In this case the labor agreement contains no express statement authorizing the entry of judgment.

The agreement contemplated by § 9, however, need not be explicit. In *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1273 (7th Cir. 1976), for example, this court held that the parties were "deemed to have consented to entry of judgment . . . as required by 9 U.S.C. § 9" because their agreement stipulated that arbitration proceedings would be conducted in accordance with the American Arbitration Association's (AAA) rules which did provide such consent.

While the contract in the present case does not adopt AAA rules, it does provide that any decision of the arbitration board "shall be final and binding upon both parties."[3] Several courts have found such language suf-

[3] Section 7 of the collective bargaining contract provides, in part, that a

> standing committee of two representatives of the Publisher . . . and a committee of two representing the Union shall be selected. . . . To this committee shall be referred all questions that may arise regarding this contract or any alleged violation thereof, which cannot be settled otherwise. . . . If the committee does not reach an agreement . . . the questions in dispute shall . . . be submitted to arbitration. . . . The arbitration board shall consist of two representatives of the Publisher and two representatives of the Union, the four to select a fifth member who shall

(Footnote continued on following page)

ficient to imply consent to the entry of judgment on an arbitration award under § 9. *Kallen v. District 1199, Nat'l Union of Hosp. Care Employees*, 574 F.2d 723, 724-26 (2d Cir. 1978); *I/S Stravborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 426-27 (2d Cir. 1974); *Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc.*, 418 F.Supp. 982, 984-85 (E.D. Mich. 1976). The court in *Kallen, supra*, 574 F.2d at 726, faced with a situation analogous to that of the present case, reasoned that

> while it is true that the Employer has resisted enforcement of the award, it nevertheless participated fully in the arbitration process before the American Arbitration Association. In such circumstances, the Employer can hardly avow that an award will be "final, conclusive and binding" upon it without implicitly agreeing that federal court intervention may be sought to compel compliance.

In *Kallen*, the court invoked both the Arbitration Act and the Labor-Management Relations Act to confirm an arbitration award rendered pursuant to a collective bargaining contract. *Accord*, *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 276 (1932) (In upholding the district court's confirmation of an arbitration award under § 8, Title 9's admiralty provision, the Court found that the agreement's stipulation that an arbitration award be "final and binding" was sufficient to refute the petitioner's argument that § 9 precluded the judgment because the contract contained no language explicitly authorizing the entry of judgment).

The Due Process Claim

Although we find § 9 of the Arbitration Act applicable in this case, we cannot accept the argument that Fed. R.

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[3] *continued*

act as chairman of the board. Said fifth member may be selected in any manner agreed upon by the four members, but if . . . the four members are unable to agree upon a fifth member, he shall be selected . . . in accordance with rules of the American Arbitration Association. . . . *The decision of this board shall be final and binding upon both parties.* . . . (Emphasis added.)

Civ. P. 81(a)(3) automatically preempts procedures which otherwise would obtain under Rules 12(b) and 56. Nothing in § 9 precludes application of these rules. Courts have applied various sections of the Rules of Civil Procedure in actions under the Arbitration Act. *See, e.g., Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) (Rule 42(a) consolidation); *In re Hidrocarburos y Derivados, C.A., and Lemos*, 453 F.Supp. 160 (S.D.N.Y. 1977) (Rule 4(d)(7) service of complaint); *Robinson v. Warner*, 370 F.Supp. 828 (D.R.I. 1974) (Rule 42(a)); *In re Int'l Union of Electrical, Radio & Machine Workers, AFL-CIO and Westinghouse Electric Corp.*, 48 F.R.D. 298 (S.D.N.Y. 1969) (discovery); *In re Lodge 506, Int'l Assoc. of Machinists and General Electric Co.*, 211 F.Supp. 654 (N.D.N.Y. 1959) (motion to dismiss).

The Union submits no compelling reason why normal procedures should be subverted where, as here, the parties proceeded in traditional adversary fashion. The Union, for example, filed its petition for enforcement by a summons calling for an answer within twenty days as opposed to the typical commencement of a proceeding under the Arbitration Act by application and notice of the motion to confirm the award. 9 U.S.C. § 9. The Union's petition was captioned as a regular adversary proceeding rather than "*In re . . .*". The Union stipulated to an extension of time for the Employer to *answer* or otherwise plead. The Employer explicitly responded under Rule 12(b) (6). The Union expressly answered this motion to dismiss with a "Reply To Respondent's Motion To Dismiss." We therefore conclude that Rule 12(b) was applicable in this case.

Because the district court granted enforcement of the award, it necessarily treated the Employer's 12(b)(6) motion as a motion for summary judgment. Although this conversion is appropriate when the court determines that no triable issues of material fact exist, *Chicago-Midwest Meat Assoc. v. City of Evanston*, 589 F.2d 278, 281-82 (7th Cir. 1978), *cert. denied*, 442 U.S. 946 (1979), Rule 12 outlines the applicable procedure for conversion which was not entirely followed here.

Initially, Rule 12 requires that conversion occur only when "matters outside the pleadings are presented to and not excluded by the court." The Employer asserts that no matters outside the pleadings ever were presented to the court in this case. It is true that memoranda of points and authorities generally are held not to constitute matters outside the pleadings. *Macklin v. Butler*, 553 F.2d 525, 528 (7th Cir. 1977) (per curiam); *Sardo v. McGrath*, 196 F.2d 20, 23 (D.C. Cir. 1952). In this case, however, the parties have submitted numerous exhibits which include the collective bargaining contract at issue, the Warns' arbitration award and the arbitration panel's company members' dissent thereto, the prior Solomon award which related to a similar dispute between the parties, and various letters relevant to the arbitration proceedings. These exhibits constitute matters outside the pleadings sufficient to convert a 12(b)(6) motion into a motion for summary judgment.[4]

[4] The defendant argues that dicta in *Macklin v. Butler*, *supra*, 553 F.2d at 528 n.1, preclude a court from ever treating exhibits attached to a memorandum as matters outside the pleadings. We disagree. *Macklin* did not use such broad language, but merely stated that the memorandum and accompanying documents submitted in that case did not meet the requirements of Rule 56(e). The *Macklin* court was primarily dissatisfied with the unsworn nature of the memorandum in support of the motion to dismiss. The nature of the exhibits in *Macklin* was not set out in that opinion.

In the present case, the documents submitted as exhibits constituted the basic evidence upon which the court was bound to resolve the merits of this case. It is well settled that courts are strictly limited in reviewing arbitration awards to determine (1) whether the award draws its essence from the contract and (2) whether "the arbitrator's words manifest an infidelity to this obligation." *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local 781*, 629 F.2d 1204, 1215 (7th Cir. 1980); *Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l Union, Local 7-1, Inc.*, 548 F.2d 1288, 1293-94 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977). Moreover, the "determination of whether or not the Board exceeded its authority in making the Award must be made by reference to the four corners of the instrument constituting the agreement between the parties." *Gibbons v. United Transp. Union*, 462 F.Supp. 838, 844 (N.D.Ill. 1978). It is difficult to imagine documents more reliable and relevant to the determination of the controversy than those exhibits attached to the complaint and brief in support of the motion to dismiss in this case.

Affidavits "as such . . . are not indispensably required where exhibits annexed to a . . . complaint . . . demonstrate that the contention of the party is something different from the barebones formal allegations." *Bradford v. School District No. 20*, 364 F.2d 185, 187 (4th Cir. 1966), quoting *Smoot v. State Farm Mut. Auto. Ins. Co.*, 299 F.2d 525, 528 (5th Cir. 1962). *See, e.g., General Guar. Ins. Co. v. Parkerson*, 369 F.2d 821, 823 (5th Cir. 1966) (exhibits); *Pintozzi v. Scott*, 436 F.2d 375, 378 n.3 (7th Cir. 1970) (exhibits); *Smith v. United States*, 362 F.2d 366, 367-68 (9th Cir. 1966) (exhibit); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 460 F.Supp. 1359, 1364 (D. Hawaii 1978) (exhibits and tables).

The Employer next contends that even if the exhibits did satisfy Rules 12(b) and 56, the district court erred by failing to give the parties notice that it intended to treat the 12(b)(6) motion as one for summary judgment. While we agree that the conversion of a 12(b)(6) motion into a summary judgment motion *should* be accompanied by prior notice and "a reasonable opportunity to establish the existence of material controverted facts," the failure to afford such procedure does not necessarily mandate reversal. *Chicago-Midwest Meat Assoc. v. City of Evanston*, *supra*, 589 F.2d at 282. Where the record discloses the existence of unresolved material fact issues, or where the parties represent that they would have submitted specific controverted material factual issues to the trial court if they had been given the opportunity, we would have to find that summary judgment was inappropriate. *Choudhry v. Jenkins*, 559 F.2d 1085, 1090 (7th Cir.), *cert. denied*, 434 U.S. 997 (1977); *Macklin v. Butler*, *supra*, 553 F.2d at 528. But where no potential disputed material issue of fact exists, a summary judgment will not be disturbed even though the district court disregarded the procedure which should have been followed. *Chicago-Midwest Meat Assoc. v. City of Evanston*, *supra*, 589 F.2d at 282. Consequently, the resolution of the Employer's due process claim depends upon whether any material disputed factual issue existed which was either evident from the record itself, or which the Employer could have submitted if given the opportunity.

The Employer has not alleged any specific disputed factual issues sufficient to preclude summary judgment in its brief on appeal. Nor, even though explicitly asked, did the Employer reveal the existence of any such issues in oral argument. The only apparent allegations of disputed factual issues which the Employer might have presented to the trial court if given the opportunity were in fact submitted to that court in the Employer's brief in support of its motion to stay the judgment pending appeal. There the Employer asserted that "had the Court given some indication of its intent to make a final disposition of this case, respondent would have supplied affidavits directly controverting (1) the contention that there was adverse 'impact' on composing room employees caused by the introduction of the VDT system [termed 'undisputed' by the district court] and (2) the allegation of . . . the Petition that sixty days of negotiations took place pursuant to part 3 of the Warns award." (Footnote omitted.)

The district court responded to the first contention by stating that the court's "use of the word 'undisputed' was perhaps unfortunate, but in any case the impact issue was one within the arbitrator's and not the Court's jurisdiction, was decided by the arbitrator adversely to the respondent, and is not subject to revision by the Court." Secondly, the court reasoned that its order "merely required the parties to comply forthwith with paragraph 3 of the award and did not make a finding as to the degree of compliance which had already been achieved. Thus the order did not by its terms accept the petitioner's claim." The court invited the Employer to move the court for a clarification of its order.

Remanding this case to allow the Employer to assert these allegations would be futile. It is irrelevant whether or not the district court's characterization of the VDT system's adverse impact on composing room employees as "undisputed" could be rebutted. The issue before the district court, as discussed in detail separately hereinafter, was whether or not the arbitrator exceeded the scope of his authority when he determined that the Employer had a contractual duty to bargain over the VDT system's "impact." To the extent that the degree of

impact is at all relevant in this case, it would be a question to be resolved by the arbitrator, assuming *arguendo* that he had authority to impose a duty to bargain over impact.[5] Judicial review of an arbitration award is limited to determining (1) whether the award draws its essence from the contract and (2) whether "the arbitrator's words manifest an infidelity to this obligation." *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local 781*, 629 F.2d 1204, 1215 (7th Cir. 1980); *Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l Union, Local 7-1, Inc.*, 548 F.2d 1288, 1293-94 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977). Consequently, in *Int'l Union of Operating Engineers, Local Union 139 v. Carl A. Morse, Inc.*, 529 F.2d 574, 581 (7th Cir. 1976), this court reasoned that the

> employer has complained that the proceedings below partook of the nature of a motion for summary judgment, but deprived it of the opportunity to present affidavits in support of its defenses in opposition to arbitration. We have assumed, for the purposes of this decision, that the employer's positions can be adequately backed up by evidence sufficient to create genuine issues of fact. But those issues are to be resolved by the arbitrator, not by the court. Whether under summary judgment procedures or upon a petition to compel arbitration under the United States Arbitration Act, . . . the issues open for judicial consideration are limited and rarely factual. Here they raise only questions of law, ...

The second allegation which the Employer would have raised, that sixty days of negotiations had not in

[5] Even if the degree of impact had been an issue within the purview of the district court, it is well settled that even genuine disputed issues of fact will not preclude summary judgment unless they are material to the legal issues in the case. *Terket v. Lund*, 623 F.2d 29, 31 (7th Cir. 1980). The degree of impact caused by the imposition of the VDT system is not material to whether or not a contractual provision existed in the contract from which the arbitrator could have imposed a duty to bargain over impact.

fact taken place, would likewise have no significance on the court's order enforcing the award. The court merely ordered the parties to comply with Paragraph 3 of the arbitrator's award which directed the parties to negotiate for sixty days and then return to arbitration if the parties were unable to reach an agreement. The court did *not* find that the parties had already complied with the sixty days bargaining directive.

Because we find the Employer's due process claim to be without merit, we reach the issue of whether or not the district court ruled correctly by finding that the arbitrator did not exceed his authority and by ordering enforcement of the award.

II.

In Part 2 of his award, Arbitrator Warns found that "the introduction of the Hendrix [VDT] system, a technological change, has sufficient impact on the job elements of the Composing Room as to warrant the imposition of a duty to bargain about such impact."[6] A determination of whether or not the arbitrator exceeded his authority must be made by reference to the contract because, as the Supreme Court has ruled,

> an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

[6] The propriety of Part 1 of the award, which confirmed the Employer's right to introduce the VDT system and to "make appropriate work assignments," is not at issue. The Union contends that the entire award was within Arbitrator Warns' authority. The Employer agrees that Part 1 of the award was appropriate, but contests the validity of Parts 2 and 3.

The arbitrator's authority to enter Part 2 of his award, if any, derives from the "new process" clause of § 4 of the collective bargaining agreement which provides, in relevant part, that

> In the event of the introduction into Composing Room work of any process, machinery or equipment which functions as a substitute for, or evolution of, the typesetting and typecasting processes that were in use at the date this contract became effective, all questions concerned with *the method of operation, the complement of men required or the retraining of affected employees* shall be determined by the Joint Standing Committee. . . .[7]

(Emphasis added.) The "new process" clause explicitly limits questions which may be submitted to arbitration in the event of the introduction of a substitute process to (1) method of operation, (2) complement of men and (3) retraining. The district court acknowledged these limitations, but assumed, without examination, that a directive to bargain over "impact" fitted within these categories.[8]

Negotiating over the impact of the VDT system on composing room employees would include bargaining over a broad range of items including, but not limited

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[7] If the Joint Standing Committee is unable to reach an agreement, § 7 of the contract provides that the dispute shall be submitted to arbitration. *See supra*, note 3.

Section 5 establishes that the "parties agree that . . . the complete obligation of each to the other is expressed herein."

[8] The court concluded that

> The respondent concedes that the contract requires negotiation or arbitration over the method of operation, the complement of men required, or the retraining of affected employees arising from new Composing Room technology. What constitutes "new composing room technology" is a matter of contract interpretation for the arbitrator and not for this court to decide. Once having decided that technological change in the Editorial Department was included within the spirit of that phrase, Arbitrator Warns was entitled to impose the remedy provided for in the contract when such change occurred.

to, issues such as involuntary layoff, termination, bonuses and loss of overtime. A directive to bargain over this broad range of issues injects items into negotiation which were not contemplated by the "new process" clause of the collective bargaining contract. Even the most general of the three categories, method of operation, clearly refers to *how* the system will be run and is not a catchall term which imposes a duty to bargain about anything conceivably affected by the new technology. Consequently, because Part 2 of the arbitration award does not draw its essence from the contract, it cannot be enforced. *See, e.g., City Electric, Inc. v. Local Union 77, Int'l Brotherhood of Electrical Workers*, 517 F.2d 616, 619-20 (9th Cir.), *cert. denied*, 423 U.S. 894 (1975) (court refused enforcement of arbitration award directing the parties to negotiate the rate of a travel allowance because the award was not authorized by the collective bargaining agreement).

The district court acknowledged the Employer's contention that "in making his award, Arbitrator Warns relied in part on certain policies of the Labor-Management Relations Act and on the decisions of other arbitrators in similar actions, rather than basing his award solely on the language of the contract at issue." The court responded by quoting *Enterprise Wheel, supra*, for the proposition that an ambiguous opinion accompanying an arbitration award will not prohibit enforcement of the award. *Enterprise Wheel, supra*, 363 U.S. at 598-99.

While we adhere to the Supreme Court's admonition in *Enterprise Wheel* in appropriate cases, *Amoco Oil Co., supra*, 548 F.2d at 1294-95, this is not such a case. We do not regard it as necessary to discuss the arbitrator's reasoning because we find that the award itself demonstrates an infidelity to the plain restrictive terms of the contract.

The Employer contended, in oral argument, that Part 3 of the award, ordering bargaining, also exceeded the arbitrator's authority. We do not need to determine this issue inasmuch as the direction to bargain related only to the "impact" matter.

For the reasons stated herein, the judgment granting enforcement of Parts 2 and 3 of the arbitration award is reversed. Costs against the plaintiff-appellee.

REVERSED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 4969—Midwest Law Printing Co., Inc., Chicago—1-23-81—350

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

March 31, 1981

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. BYRON G. SKELTON, Judge*
Hon. HARLINGTON WOOD, JR., Circuit Judge

MILWAUKEE TYPOGRAPHICAL UNION NO. 23, Plaintiff-Appellee, vs. NEWSPAPERS, INC., Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 79-C-649 John W. Reynolds, Judge

NO. 80-1272

In its rehearing petition, the Union expressed uncertainty regarding the effect of the Court's decision in this case, particularly

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*Senior Judge Byron G. Skelton of the United States Court of Claims is sitting by designation.

whether the decision permits further arbitration pursuant to the Warns' award, or whether any future arbitration regarding the VDT system must begin anew. This Court clearly invalidated both Parts 2 and 3 of the Warns' award. Thus, the Warns' award contains no valid bargaining directive which would require bargaining or further arbitration pursuant to that particular award.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Milwaukee Typographical Union No. 23, plaintiff-appellee, a majority[1/] of judges have voted to deny rehearing en banc, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same hereby, DENIED.

1/ Chief Judge Fairchild and Judges Swygert and Cudahy would have granted the en banc rehearing request.

Office-Supreme Court, U.S.
FILED
AUG 3 1981
STEVAS,
CLERK

No. 80-2215

In the Supreme Court of the United States

OCTOBER TERM, 1980

MILWAUKEE TYPOGRAPHICAL UNION NO. 23,

Petitioner,

vs.

NEWSPAPERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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July 30, 1981

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

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MILWAUKEE TYPOGRAPHICAL UNION NO. 23,

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On Petition for a Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the decision of the court of appeals is in conflict with the decision of another federal court of appeals on the same matter.

2. Whether the court of appeals has decided this case in a way in conflict with applicable decisions of this Court.

3. Whether the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

PARTIES

The parent entity of the Respondent is The Journal Company. The Respondent has no subsidiaries but is affiliated with the following entities: MJE Corporation; Tempo Communications, Inc.; Midwestern Relay Co.; Trumbull Printing Co.; Perry Printing Co.; WTMJ, Inc.; and Teltron, Inc.

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Other Authorities:

Kaden, Judges and Arbitrators: Observations on the Scope of Judicial Review, 80 COLUM. L. REV. 267 (1980) 11

St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 75 MICH. L. REV. 1137 (1977) 11

Hogler, Industrial Due Process and Judicial Review of Arbitration Awards, 31 LABOR LAW JOURNAL 570 (1980) 12

OPINIONS BELOW

The opinion of the District Court (App. of the Pet., p. A33) is reported at 482 F. Supp. 1238 (E.D. Wis. 1980). The opinion of the Court of Appeals for the Seventh Circuit together with denial of petition for rehearing (App. of the Pet., p. A53) is reported at 639 F. 2d 386 (7th Cir. 1981).

STATEMENT OF THE CASE

The Statement of the Case set out in the Petition (at pp. 12-26) is in most respects adequate. However, a serious mischaracterization occurs at page 18 of the Petition with the contention that Arbitrator Warns decided the Hendrix System and its "impact" upon the bargaining unit were expressly within the three distinct topics reserved for arbitration by Section 4 of the labor agreement. In fact, Warns sanctioned the introduction of the system and the respondent's work assignments with respect to same in part 1 of his award (App. of the Pet., p. A26). He then proceeded, however, to fashion parts 2 and 3 of the award, although admittedly without basis in Section 4 or other language in the labor agreement (App. of the Pet., p. A23).

Further, respondent objects to petitioner's characterization of the significance of the votes of three judges in the Court of Appeals for a rehearing en banc in this case (Pet., p. 29). There is no basis whatever to suppose that these three judges hold the views on the merits which petitioner attributes to them (*See* App. of the Pet., p. A68, n. 1).

SUMMARY OF ARGUMENT

In reviewing the award at issue, the Court of Appeals took a restrained and limited view of its role, adhering to the principles set out in *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). Accordingly, the award was tested for its fidelity to the labor agreement. Upon finding the award in irreconcilable conflict with the subject matters clearly marked out for arbitration in the contract, the Court invalidated the award without further inquiry, either into the reasoning of the arbitrator or his remedy. The authorities cited by the petitioner acknowledge the validity of the Court's approach. Further, there being no ambiguity in the award, cases cited by petitioner with respect to the remand of uncertain or incomplete arbitration awards are inapposite.

There is no merit to petitioner's assertion that this case demonstrates a need for further refinement of the standards of judicial review set out in the *Steelworkers Trilogy*.[1] The commentators adduced by petitioner recognize the validity of the procedure here utilized by the Court of Appeals and call for the elucidation of the *Trilogy* only in situations where a reviewing court has displaced the arbitrator and undertaken its own analysis of ambiguous contract language. Such is not the case now before this Court.

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[1] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and, in particular, *Enterprise Wheel and Car, supra.*

ARGUMENT

I. THE CASE BELOW WAS CORRECTLY DECIDED AND IS IN ACCORD WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND THIS COURT.

In reviewing the award of Arbitrator Warns, the Court of Appeals took a clear and forthright approach applying standards established in *Enterprise Wheel & Car*. There this Court stated:

> . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. 363 U.S. at 597.

Accordingly, the Court of Appeals here reviewed the language of Section 4 of the labor agreement, the only portion of the contract even arguably applicable to the introduction of the Hendrix system (App. of the Pet., p. A64). Section 4 provides that in the event a new technological process is introduced into composing room work, three topics and *three topics only*[2] are subject to arbitration: the method of operation, the complement of men required or the retraining of affected employees. Yet Arbitrator Warns, after confirming respondent's right to introduce the Hendrix system and its work assignments with respect thereto (App. of the Pet., p. A26), proceeded to insert a fourth topic: the "impact" or effects of the new

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[2] The parties had agreed in Section 5 of the contract that their complete obligations to one another were expressed in that agreement. (App. of the Pet., p. A64, n. 7).

technology on members of the bargaining unit. As indicated by the Court of Appeals, "impact" goes far beyond any of the three topics specifically subject to arbitration (App. of the Pet., pp. A64-65). Upon concluding that "... the award itself demonstrates an infidelity to the plain restrictive terms of the contract" (App. of the Pet., p. A65), the Court's inquiry ceased. No examination of the arbitrator's reasoning or remedy was made (*Id.*). In addition to *Enterprise Wheel & Car,* the Court relied upon *City Electric, Inc. v. Local Union 77, Int'l Brotherhood of Electrical Workers,* 517 F. 2d 616 (9th Cir. 1975), cert. denied 423 U.S. 894 (1975), a case closely analogous to the one at bar. There, the court refused enforcement of the arbitrator's order that the parties bargain a daily stipend or travel allowance. In a two part award the arbitrator had determined (1) the employer-contractor was not required to pay a stipend under the "job headquarters" contract provision as contended by the Union yet (2) the employer-contractor should still be required to negotiate such a stipend because the prevailing practice of *other* employer-contractors in the area was to negotiate ad hoc agreements for stipends.

The Ninth Circuit forthrightly rejected the second part of the arbitrator's award, reasoning

> It is not the function of an arbitrator, under this agreement or traditionally, to decide in what respects the contract in question should be modified in order to bring it into line with agreements of other employers. Contract modifications are not traditionally matters for arbitration. It is the function of the arbitrator to resolve disputes as to what the contract itself provides — as to what the rights of the parties are under the contract then in force. . . . 517 F. 2d at 619.

In the instant case, Arbitrator Warns found no contract violation yet proceeded in Part 2 of the award to impose

a duty to negotiate which is wholly without basis in the labor agreement.[3]

Since there is no ambiguity in either the pertinent contract language or the Warns award, petitioner's two principal lines of argument fail. First it is contended that the decision of the Court of Appeals herein reflects a disharmony among the circuits on the proper scope of judicial review of arbitral awards. This argument, however, is premised upon the supposition that the Court of Appeals was merely reinterpreting an ambiguous contract provision. In fact, as demonstrated above, the court engaged in the restrained and limited type of review specified in *Enterprise Wheel & Car* and endorsed by case authorities cited by petitioner (Pet. pp. 31-34). In *Boise Cascade Corp. v. United Steelworkers of America,* 588 F. 2d 127 (5th Cir. 1979), cert. denied 444 U.S. 830 (1979), unlike the present case, an ambiguous contract provision was at issue. Further, the court noted ". . . courts will enforce clear contractual limitations on the authority of the arbitrator. [Cit. om.] In contrast, the employer in this case does not argue that the collective bargaining agreement barred the arbitrator from deciding the issue in dispute". 588 F. 2d at 129, n. 2. Similarly, *Torrington Co. v. Metal Products Workers Union,* 362 F. 2d 677 (2nd Cir. 1966):

> Although the arbitrator's decision on the merits is final as to questions of law and fact, his authority is contractual in nature and is limited to the powers conferred in the collective bargaining agreement. . . . The question of the arbitrator's authority is really

[3] As for petitioner's attempt to distinguish *City Electric* (Pet., p. 32), it is difficult to see how the Labor-Management Committee in that case (517 F. 2d at 618) is any less a "specific procedure for dispute resolution" than the Joint Standing Committee in Section 4 of the labor agreement herein (See App. of the Pet., p. A8).

> one of his contractual jurisdiction, and the courts cannot be expected to place their stamp of approval upon his action without making some examination of his jurisdiction to act. 362 F. 2d at 680 & n. 6[4]

Finally, *F. W. Woolworth Co. v. Miscellaneous Warehousemen's Union*, 629 F. 2d 1204 (7th Cir. 1980) and *Johnson Bronze Co. v. United Auto Workers*, 621 F. 2d 81 (3rd Cir. 1980) are both inapplicable here since each involved competing interpretations by arbitrators and reviewing courts of *ambiguous* contract provisions.

Second, petitioner appears to argue that there is some ambiguity in the Warns award in the use of its term "impact" and that therefore the award is merely incomplete and need only be remanded to the arbitrator for clarification (Pet., pp. 34-35). However, as indicated in the decision of the Court of Appeals there is no doubt whatever about the meaning of that common labor law term and no need to engage in any "interpretation" to reach that meaning (App. of the Pet., pp. A64-65). "Impact" means such topics as layoffs, terminations. bonuses and the like, all items clearly outside the scope of the three specific subjects for arbitration delineated in Section 4 of the labor agreement. Finally, if there were any

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[4] *See also, Monongahela Power Co. v. Local No. 2332, IBEW*, 566 F. 2d 1196, 1198-99 (4th Cir. 1976):

> The powers of an arbitrator are not unlimited. He derives his authority from and is bound by the terms of the contract from which he draws his authority; and while '[H]e may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.' His function is confined to the interpretation and application of the collective bargaining agreement under which he acts and, while he may give his own construction to ambiguous language, he is without any authority to disregard or modify plain and unambiguous provisions. This is a well-established principle of law.... (footnotes omitted).

doubt that "impact" is to be understood in its commonly accepted meaning, that doubt is removed by Warns' express reference to decisions of the National Labor Relations Board (App. of the Pet., App. A23-25). This reference makes it clear that Warns had in mind the same meaning of "impact" as was understood by the Court of Appeals. Consequently, there is no need for remand to arbitration. There can be no doubt that on remand the arbitrator's remedy would embrace the forbidden areas of layoffs, terminations, bonuses, etc. For the foregoing reasons, the cases cited by petitioner in support of remand are inapplicable: *Enterprise Wheel & Car, supra* (ambiguity in award of back pay); *General Warehousemen & Helpers v. Standard Brands, Inc.*, 579 F. 2d 1282 (5th Cir. 1978) (remand for calculation of damages in context of admitted contractual violations by employer); *United Steelworkers of America v. W. C. Bradley Co.*, 551 F. 2d 72 (5th Cir. 1977) (remand for consideration in light of new evidence); *Hart v. Overseas National Airways, Inc.*, 541 F. 2d 386 (3rd Cir. 1976) (remand to district court for clarification on the question of liability and then to arbitrator for ministerial calculation of damages); and *Int'l Brotherhood of Electrical Workers v. Olin Corp.*, 471 F. 2d 468 (6th Cir. 1972) (remand of ambiguous award for computation of lost earnings).

In summary, petitioner's entire assault upon the validity of the decision of the Court of Appeals is based upon the premise that there is ambiguity in the contract language or in the award. There is no such ambiguity in this case and the analysis utilized by the Court of Appeals is in harmony with decisions of this Court and other Circuit Courts of Appeal.

II. THIS CASE CALLS FOR NO ELABORATION OF THE PRINCIPLES SET OUT IN THE *STEELWORKERS TRILOGY*.

As demonstrated above, there is no conflict among the Circuit Courts of Appeal on the proper scope of judicial review where, as here, the contract and arbitration award are clear and unambiguous. Petitioner, however, also cites various commentators for the proposition that a refinement of principles in the *Trilogy* is now required (Pet., pp. 30-31, 36). Yet these commentators follow the case law to the effect that a reviewing court must at least satisfy itself that the arbitrator has stayed within his grant of power in the contract. For example, Professor Kaden states "Certain qualifications to the principle of finality are well settled. Thus, if a contract clearly denies the arbitrator jurisdiction over a particular complaint, a court must refuse to enforce an award that he was without authority to issue." 80 COLUM. L. REV. 267, 296 (1980). Similarly, Professor St. Antoine in discussing exceptions to the principle of judicial deference to arbitration awards:

> . . . The appropriate scope of judicial review should be determined by the particular agreement in any case, not by anything inherent in the arbitration or collective bargaining process. I should have thought this was pretty clear from *Enterprise Wheel* itself. For all the bouquets thrown arbitrators and arbitration by Justice Douglas, it is ultimately the 'collective bargaining agreement' from which an award must draw its 'essence' in order to be valid and enforceable.
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> . . . [T]he arbitrator remains the creature of contract, and the parties retain the power to remove such disputes from his purview as they see fit. 75 MICH. L. REV. 1137, 1142, 1150 (1977),

and Raymond L. Hogler, 31 LABOR LAW JOURNAL 570, 571 (1980): "... it is nevertheless established that an award which is 'contrary to the terms of the collective bargaining contract' will not be upheld".

Even if it were conceded that in some instances reviewing courts have erred by merely displacing with their own analysis an arbitrator's interpretation of ambiguous contract language, this is certainly not such a case. Any attempt to curb excesses in those cases could only be dictum here. Moreover, there is at present ample admonitory language in the *Trilogy* emphasizing the arbitrator's power to interpret contract language (e.g. *Enterprise Wheel & Car,* 363 U.S. at 599).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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